SUPREME COURT, U. S.

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No. 234

In the Supreme Court of the United States

OCTOBER TERM, 1968

TONKIN CORP. OF CALIFORNIA D/B/A SEVEN-UP BOTTLING CO. OF SACRAMENTO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The Board's initial decision and order (R. 15–25, 71–72) [1] are reported at 147 NLRB 401. The opinion of the court of appeals, enforcing the Board's order in part and remanding the case to the Board for reconsideration, is reported at 352 F. 2d 509.

The Board's supplemental decision and order (App. *infra*) are reported at 158 NLRB 1223. The opinion

[1] "R." references are to the materials contained in Volume I of the record in the court of appeals; "Tr." references are to the transcript of testimony in Volume II of the record; "G.C. Exh." refers to the General Counsel's exhibits, "P. Exh." to the petitioner's exhibits.

of the court of appeals following remand (Pet. App. 1–9) is reported at 392 F. 2d 141.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1968, and a petition for rehearing was denied on May 14, 1968. The petition for a writ of certiorari was filed on June 26, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board's finding that the Company locked out its employees to coerce them in their choice of a bargaining representative is supported by substantial evidence.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B to the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

For a number of years the employees of the Company have been represented by the Sacramento Seven-Up Employees' Union (the "Independent"). They comprise the Independent's entire membership and are required to belong as a condition of employment (R. 16; Tr. 46–47, 131–132, 406–407, G.C. Exh. 2, p. 6). The Independent, which was initially established in order "to keep the Teamsters out" (Tr. 422), has

no office (Tr. 412), keeps sporadic records (Tr. 412, 420), and has never processed a grievance (Tr. 419, 413). Its infrequent meetings have been primarily social (R. 16; Tr. 125–127, 116–120, 9, 85, 403, 412–413, 418–422).

In March 1963, the Independent and the Company began negotiations for a new contract. After the employees had rejected the Company's proposals, Company President Harry Tonkin called a meeting of all employees on Friday evening, March 29 (two days before the existing contract was to expire), and told them that they could not go to work on Monday morning unless the contract was signed (R. 17; Tr. 15–19, 160, 76–77, 25–26, 107–108, 258). He added that the Company would find new men to take the place of those who did not want to work (Tr. 160, 107). Tonkin further stated that he knew that some of the employees had been approached by the Teamsters and asserted that he did not want to negotiate with the Teamsters (R. 17; Tr. 20–22; 76, 155–160, 271–272).

After Tonkin left, the employees discussed the Company's contract proposal, but not enough men remained at the meeting to take a vote (R. 16; Tr. 23–25, 99–102, 340, 334). Later that evening, a small group of employees, including Independent president, Howard Hill, and secretary-treasurer, William Barwise, went to the Company's office to confer with Harry Tonkin and his brother Millard, the Company's vice president (*ibid.*). Hill said that he could make no final commitment on contract matters, because any agreement would be subject to ratification by the union membership (Tr. 101–102, 262). Tonkin either

rejected the employees' requests for concessions on holidays, a bonus plan, sick leave, and health and welfare, or replied that the Company would do the best it could, but he refused to incorporate any of these matters into the written contract (Tr. 100–101, 108–109, 62–65). The employees expressed satisfaction with the Company's offer to match the wage rate paid by the local Pepsi-Cola bottling concern, and they left with the understanding that Tonkin would call the Pepsi-Cola concern to ask about ~~their~~ its wage rate (Tr. 82–83). On Saturday, Millard Tonkin learned that Pepsi-Cola was also deadlocked over wages, and he reported that information to Bernal Williams, an employee who had been at the meeting (Tr. 299).

On Sunday, March 31, Hill, Barwise, and Williams met with some Pepsi-Cola employees and a Teamsters representative (R. 17; Tr. 26–27). Barwise signed a Teamster card himself, and solicited other Company employees on behalf of the Teamsters (R. 17; Tr. 26–28). By Monday morning, he and Hill had submitted to the Teamsters bargaining authorization cards from 9 of the Company's 17 employees (*ibid.*).

When the employees reported for work on Monday morning, April 1, they found the gate to the truck-yard locked (R. 17; Tr. 29, 129, 141, 162, 337). Harry Tonkin assembled them in the plant office and announced that no one could go to work until the contract was signed (R. 17; Tr. 163–164). He observed that if the men did not want to work, the Company had no lack of job applicants (*ibid.*). Tonkin told the employees, "We have this contract and if any of the Union officials don't want to go to work, we will

have a new election and get new plant union officials" (R. 17; Tr. 163–164, 131). He added that he knew some of the employees had been approached by the Teamsters and questioned why the men wanted to be "dominated" by that union (Tr. 30). The employees twice withdrew to vote on the Company's proposal and twice rejected it (R. 17; Tr. 31–36, 162–163). Following the second vote, however, the men began to wander back into the plant. Later that morning, Hill and Barwise signed the contract without formal approval of the membership (*ibid.*). When one of the Tonkin brothers said that the Company would find out who had solicited cards for the Teamsters, Barwise admitted that he had done so (R. 17; Tr. 35–36).

On April 2, the Teamsters filed a petition for a representation election among the Company's employees (R. 18; G.C. Exh. 3a). The Board's regional office wrote to the Company and the Independent, notifying them of the petition and asking if any collective-bargaining agreement was in effect (R. 18; Tr. 69–71, P. Exh. 2). The Independent was advised that it should reply by April 8, 1963, forwarding two copies of any contracts it had with the Company, and that if it did not reply, the Board would assume that it had no interest in the proceeding (R. 18; P. Exh. 2). The Tonkins summoned Hill and Barwise to the Company's office on April 5 to question them about the letters from the Board, and Hill explained that the Teamsters' petition had been filed as a result of the cards which he and Barwise had solicited (R. 18; Tr. 36–40, 110–111, 137). The Tonkins offered to make a copy of the contract for the Independent,

but Hill said that he had not decided whether to reply (R. 18; Tr. 38). The next day, Hill and Barwise advised Millard Tonkin that the Company could do as it wished, but the Independent was not "going to do anything about it in any manner whatsoever" (R. 18; Tr. 39–40, 110–111). Millard Tonkin thereupon mailed a copy of the contract to the Board on behalf of the Company and another copy on behalf of the Independent (R. 18; Tr. 318–319, 324). The latter was mailed in an envelope bearing the Independent's return address, and was accompanied by a letter of transmittal reading:

> The enclosed contracts are sent as requested by the NLRB.
> 7-Up Employees Union of Sacramento.

The original unfair labor practice charge was filed on April 5. On April 9, the day after the Company received a copy of the charge, it discharged Barwise, allegedly for failure to keep up his sales (R. 18; Tr. 41, 48, 286–287).

B. THE DECISIONS BELOW

In its initial decision, the Board found that the Company violated Section 8(a) (1), (2), and (3) of the Act by locking out its employees and otherwise interfering with the employees' choice of bargaining representative. The Board ordered the Company to cease and desist from the violations found, to withdraw recognition from the Independent unless and until it is certified as bargaining representative by the Board, to reimburse the employees with interest for dues checked off under the April 1 contract, and

to post appropriate notices (R. 23–24, 72). The Board also found that the Company's discharge of Barwise was discriminatorily motivated, in violation of Section 8(a)(3) of the Act, and ordered his reinstatement.

The court of appeals enforced the Board's order as to the reinstatement of Barwise, but with respect to the other violations, the court remanded the case to the Board to reassess the legality of the lockout in light of this Court's intervening decision in *American Ship Building Co.* v. *National Labor Relations Board,* 380 U.S. 300. *National Labor Relations Board* v. *Tonkin Corp.,* 352 F. 2d 509.

On remand, the Board reaffirmed its initial decision and order. The Board found that the purpose of the lockout here, unlike *American Ship Building,* was to prevent the Company's employees from having a free choice in selecting their bargaining representative (App., *infra,* pp. 16–17).

Following the remand, the court of appeals held that the Board's findings were supported by substantial evidence, and enforced the Board's order in full (Pet. App. 1–9).

ARGUMENT

In *American Ship Building Co.* v. *National Labor Relations Board,* 380 U.S. 300, 308, this Court upheld the legality of a lockout employed "solely as a means to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached," but distinguished, as unaffected by that holding, "cases where the Board has concluded on the

basis of substantial evidence that the employer has used a lockout as a means to injure a labor organization or to evade his duty to bargain collectively."

Petitioner contends that the sole purpose of its lockout was to bring economic pressure on the Independent to sign the contract. The Board found, however, and the court of appeals agreed (Pet. App. 9), that the lockout was an "integral part" of the Company's effort to "frustrate the process of collective bargaining by preventing a free choice of a bargaining representative by the employees, and rendering the incumbent Union incapable of effective and responsible representation; and was also designed to encourage membership in the incumbent Union and discourage membership in the Teamsters" (App., *infra*, pp. 16–17). Accordingly, the sole question presented is whether substantial evidence supports the Board's finding that the lockout was illegally motivated. There is no occasion for further review of this factual issue. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, the Board's finding is amply supported. On March 29, when Company President Tonkin first announced that employees would not be allowed to work the following Monday without a contract, he adverted to the Teamsters' campaign and asserted that he did not want to negotiate with the Teamsters. He again referred to the Teamsters' campaign when he spoke to the locked-out employees on Monday, and questioned his employees' desire to be "dominated" by that union. In addition, after reasserting that the employees could not work without a

contract, Tonkin threatened that "if any of the Union officials don't want to go to work, we will have a new election and get new plant union officials." After these tactics secured a new contract with the Independent, Millard Tonkin tendered the contract, on behalf of the Independent, as a bar to the Teamsters' election petition.[2] And when the Teamsters filed an unfair labor practice charge attacking the Company's conduct in securing the contract, the Company discharged Barwise because of his activities in support of the Teamsters. In these circumstances, the Board reasonably concluded that the lockout was prompted by a purpose to impede the employees' freedom of choice in the selection of a bargaining representative.[3]

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[2] Under the Board's contract-bar rule, an election petition will not be entertained for the duration of a collective-bargaining agreement covering the unit or for three years from its execution, whichever is less. *General Cable Corp.*, 139 NLRB 1123.

[3] Petitioner's reliance on *National Labor Relations Board* v. *Swift & Co.*, 294 F. 2d 285 (C.A. 3) and related cases (Pet. 17), is misplaced. The question here is not whether it is permissible for an employer to enter into, or insist upon, an agreement with an incumbent union where a rival union may be claiming to represent the employees. More than that was involved here for, as the Board found on the basis of the entire record, petitioner's purpose in locking out the employees was not merely to compel execution of the agreement but to coerce them in their choice of a bargaining representative.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
ELLIOTT MOORE,
Attorney,
National Labor Relations Board.

JULY 1968.

APPENDIX

UNITED STATES OF AMERICA

Before the National Labor Relations Board

TONKIN CORP. OF CALIFORNIA, D/B/A SEVEN-UP BOTTLING CO. OF SACRAMENTO

and

EDWARD J. FARRELL, AN INDIVIDUAL

and

SACRAMENTO 7-UP EMPLOYEES' UNION

Party to the Contract

SUPPLEMENTAL DECISION AND ORDER

On June 10, 1964, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that the Respondent had engaged in and was engaging in certain unfair labor practices and ordering that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the National Labor Relations Act. On November 10, 1965, the United States Court of Appeals for the Ninth Circuit issued a decision,[2] enforcing the order of the Board insofar as it relates to the reinstatement and compensation of employee Barwise, but remanding the issues subsumed in the remaining "lockout" portions of the order to the Board for further consideration, and

[1] 147 NLRB 401.

[2] 352 F. 2d 509.

such proceedings as the Board may deem appropriate, in the light of *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, decided by the United States Supreme Court subsequent to the Board's Decision and Order herein.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with its reconsideration of this case to a three-member panel.

As stated by the Court of Appeals, in *American Ship* the Supreme Court held that it was not an unfair labor practice, within the meaning of Section 8(a) (1) or (3) of the Act, for an employer temporarily to lock out his employees with the sole object of applying economic pressure to support a legitimate bargaining position, after an impasse in collective-bargaining negotiations had been reached; and the Supreme Court specifically stated: "This is the only issue before us, and all that we decide." We note also that the Supreme Court in *American Ship* emphasized, in finding that the lockout did not violate Section 8(a)(1), that there was no basis for finding that the lockout was unlawfully motivated either to destroy or frustrate the process of collective bargaining or to destroy the union's capacity for effective and responsible representation; and then emphasized, in finding that the lockout did not violate Section 8(a)(3), that there was no evidence or finding that the employer was activated by a desire to discourage membership in the union as distinguished from a desire simply to affect the outcome of the particular negotiations in which he was involved.

The essential facts in the case herein are as follows:

For a number of years, the Respondent has been a party to a series of collective-bargaining agreements

with the Sacramento 7-Up Employees' Union covering the Respondent's nonsupervisory employees. Under these contracts, the Respondent's employees, who comprise the entire membership, are required to be members of the Union as a condition of employment, and the Respondent checks off their monthly dues. Meetings of the Union have been irregular and infrequent and have been largely social.

In March 1963, the parties began negotiations for a new contract and held several meetings. On March 27, 4 days before the old contract was to expire, the employees rejected the Respondent's most recent offer, and on Friday evening, March 29, Respondent President Harry Tonkin held a meeting of all employees to discuss the contract. Tonkin told the men that they could not go to work on Monday morning unless the contract was signed and that he wanted a contract so that they could go to work in harmony. Tonkin added that any employees not wishing to work under the Respondent's contract could "do what they want". He also added that he knew that the Teamsters had approached some of the employees and that he did not want to negotiate with the Teamsters, that he wanted to continue to do business with the Union rather than the Teamsters.

After Tonkin left, the employees discussed the Respondent's proposal, but not enough men remained at the meeting to take another vote. Later that evening, a small group of employees, including Howard Hill, the Union's president, and William Barwise, its secretary, went to the Respondent's office to confer with Harry Tonkin and his brother Millard, the Respondent's vice president. Hill said that in discussing contract matters he could make no final commitment, because any agreement would be subject to ratification by the Union membership. The employees asked for

concessions on such items as holidays, a bonus plan, sick leave, and health and welfare, but Tonkin either rejected the requests or merely replied that the Respondent would do the best it could in the future, and refused to incorporate any of these matters into the written contract.[3] The Tonkin brothers offered to match any higher rate paid by the local Pepsi-Cola bottling concern. The employees present expressed satisfaction with this point and the meeting broke up. The next day, Saturday, Millard Tonkin called the manager of the Pepsi-Cola concern to ask about their wage rate, but learned that Pepsi-Cola was deadlocked over wages. Tonkin then called Bernal Williams, an employee who had been at the meeting, and reported this development to Williams.

On Sunday, March 31, Hill, Barwise, and Williams, at Barwise's suggestion, met with some Pepsi-Cola employees and a Teamsters representative. Barwise signed a Teamsters card himself and during that afternoon and the next morning solicited other Respondent employees on behalf of the Teamsters. By Monday morning he and Hill had submitted nine cards to the Teamsters from among the Respondent's 17 employees.

On Monday morning, April 1, the Respondent's employees found the gate to the truck yard locked. When all the employees reported for work, Harry Tonkin assembled them in the plant office and announced that no one could go to work until the contract was signed. Tonkin told the men, "We have this contract and if any of the Union officials don't want to go to work we will have a new election and get new plant union officials." Tonkin also observed that if the men did not want to work, the Respondent had

[3] At this meeting or sometime later Tonkin orally agreed to one additional holiday, but he refused to incorporate this into the written contract.

no lack of job applicants. During the course of the meeting, the employees twice withdrew to vote on the Respondent's proposal and twice rejected it. Following the second vote, however, the men began to wander back into the plant. Later that morning, Hill and Barwise, who had been the last to go back into the plant, signed the contract without formal approval of the membership. While they were signing the contract, one of the Tonkin brothers said that the Respondent would find out who had solicited cards for the Teamsters, and Barwise admitted that he had done so.

On April 2, the Teamsters filed with the Board's Regional Office a petition for a representation election among the Respondent's employees. The Regional Office then wrote the Respondent and the Union notifying them of the petition and asking if any collective-bargaining agreement was in effect. The Union was advised that if it claimed any interest in the proceeding, it should reply by April 8, 1963, forwarding two copies of any contracts it had with the Respondent, and that if it did not reply the Board would assume that it had no interest. On April 5, the Tonkin brothers summoned Hill and Barwise to the Respondent's office and questioned them about the letters from the Board. Hill explained that the Teamsters petition had been filed as a result of the cards which he and Barwise had solicited. The Tonkin brothers offered to make a copy of the contract for the Union to submit, but Hill said that he had not decided whether to reply. The next day Hill and Barwise advised Millard Tonkin that the Company could do as it wished, but the Union was not "going to do anything about it in any manner whatsoever". Thereupon, Millard Tonkin mailed a copy of the contract to the Board on behalf of the Respondent and another copy on behalf of the

Union. The latter was in an envelope bearing the Union's return address, with a letter of transmittal reading:

> The enclosed contracts are sent as requested by the NLRB
> 7-Up Employees Union of Sacramento

On Monday, April 8, the Respondent received a copy of the unfair labor practice charge here, which had been filed on behalf of the Union by its counsel, alleging, *inter alia,* that the Respondent had effectively denied its employees their right to bargain through representatives by its "interference, restraint and coercion". The next day the Respondent discharged Barwise.

In our originial Decision herein, we found that the Respondent locked out its employees to force immediate acceptance of *Respondents'* new contract terms by the incumbent Sacramento 7-Up Employees' Union, and then used this new contract to obstruct the representation petition filed by the rival Teamsters with the Board, all for the purpose of keeping the incumbent Union subservient to it as a bargaining representative and preventing the rival Teamsters from becoming the bargaining representative. Accordingly, we found that Respondent had thus unlawfully interfered with the incumbent Union's administration in violation of Section 8(a)(2) of the Act.

It is also apparent, and we find, that Respondent's use of the lockout, as an integral part of its entire course of unlawful conduct, was designed to destroy or frustrate the process of collective bargaining by preventing a free choice of a bargaining representative by the employees, and rendering the incumbent Union incapable of effective and responsible representation; and was also designed to encourage mem-

bership in the incumbent Union and discourage membership in the Teamsters.[4] Thus, unlike *American Ship*, where the *sole* object of the lockout was to apply economic pressure to support a *legitimate* bargaining position after a bargaining impasse had been reached, the lockout here was motivated by purposes repugnant not only to Section 8(a)(2) but also to Section 8(a)(1) and (3).[5] Such a lockout is the very antithesis of one solely in support of a legitimate bargaining position. Accordingly, upon reconsideration, we reaffirm our original findings that the Respondent's lockout of its employees violated Section 8(a)(1) and (3),[6] and that the lockout and subsequent conduct flowing therefrom violated Section 8(a)(2); and we reaffirm our original Order herein.

Dated, Washington, D.C.

[SEAL]

JOHN H. FANNING, *Member,*
GERALD A. BROWN, *Member,*
HOWARD JENKINS, Jr., *Member.*
NATIONAL LABOR RELATIONS BOARD.

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[4] There is additional evidence of such unlawful motivation in our finding, affirmed by the Court of Appeals, that a week after the lockout Respondent discharged employee Barwise because of his opposition to acceptance of Respondent's contract and his activity in behalf of the Teamsters, in violation of Section 8(a)(1) and (3).

[5] We thus find it unnecessary to reach questions concerning the existence of an impasse.

[6] See *American Stores Packing Co., et al.*, 158 NLRB No. 46. Cf. *Weyerhauser Company, et al.*, 155 NLRB No. 82.

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